opportunity to sign the License Agreement under protest, subject to any determination Chibardun might seek as to the City's authority to seek such an agreement. Chibardun never responded to this letter. (Affidavit of Curtis Snyder, ¶18.) Again, one must seriously question the picture Chibardun paints as an entity trying to work with the City and legitimately pursue permit approvals.

On August 26, 1997, the Rice Lake Common Council adopted Ordinance No. 849 (the "Interim Ordinance"). (A copy of the Interim Ordinance is attached as Exhibit G to Chibardun's Petition.) The Council confirmed in the Interim Ordinance that its enactment is necessary

> due to the rapidly changing telecommunications industry and the fact that the current City Code and Regulations do not adequately address the potential environmental, economic, infrastructure, safety, and health impacts associated with the type and number of telecommunication facilities and equipment located and likely to be proposed for location within City rights-of-way. . . .

(Interim Ordinance, ¶2.) The Council made clear that the purpose of the Interim Ordinance is to impose procedures on excavation permits under Section 6-2-3 of the Rice Lake Municipal Code for a period of four months or until such time as the City adopts a comprehensive right-of-way ordinance, whichever occurs first. (Id. at ¶1, and sec. 4.) The Interim Ordinance applies to all rights-of-way users and is not directed solely at Chibardun. (See id., at sec. 2.)

The Interim Ordinance directs the City Administrator to develop a comprehensive right-of-way ordinance ("ROW Ordinance") and to solicit input from interested parties.[10] (Id. at Secs. 5 and 6.) The Interim Ordinance also provides that "no person may construct, install, remove, or relocate any equipment or facilities, with a project value of $50,000 or more" in the City's rights-of-way "without the prior approval of the City Council or its designee, the Superintendent of Streets." (Id. at Sec. 2 (emphasis added).) So that existing utility services (water, sewer, gas, electric, telephone, etc.) and cable television service are not disrupted, the Interim Ordinance specifically exempts the repair and maintenance activities of existing equipment and facilities. (Id. at Sec. 3.) The Interim Ordinance applies to all rights-of-way construction projects valued at $50,000 or more by any and all rights-of-way users. (See id. at Sec. 2.) That includes GTE North, Marcus Cable, and the Rice Lake Municipal Utilities, among others. The Interim Ordinance contains nothing that suggests it is targeted to Chibardun or to any other competing telecommunications providers.

As confirmation of this, the City has recently applied the Interim Ordinance to Marcus Cable. (Affidavit of Curtis Snyder, ¶20.) On October 27, 1997, Marcus Cable submitted 38 excavation permit applications indicating that it will be undertaking a large (greater than $50,000) cable television construction project. (Affidavit of Curtis Snyder, ¶20.) Pursuant

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[10] As the City Administrator represented in his August 13, 1997 telephone message to Chibardun's General Manager, the City intends to send Chibardun a draft of the ROW Ordinance for comment once it has been prepared. (Affidavit of Curtis Snyder, ¶19.) Chibardun apparently misunderstood the City Administrator's message to refer to the Interim Ordinance rather than the ROW Ordinance. (See Petition, pp. 12-13.)

to the Interim Ordinance, Marcus Cable's request for excavation permits went before the Common Council on November 11, 1997. (Affidavit of Curtis Snyder, ¶20.) The Council voted to grant the permit applications, subject to Marcus Cable negotiating a permit agreement with the City.[11] (Affidavit of Curtis Snyder, ¶20.) The agreement the City proposed to Marcus Cable is substantively identical to the License Agreement the City proposed to Chibardun. (Affidavit of Curtis Snyder, ¶20.) (A copy of the proposed permit agreement is attached as Exhibit 4 to the Snyder Affidavit.) Changes were made only where necessary to take into account the terms of Marcus Cable's cable television franchise with the City.[12] (Affidavit of Curtis Snyder, ¶20.) Thus, the City has and will continue to apply its Interim Ordinance to all projects or activities that fall within its scope, regardless of what entity is seeking the requisite approvals. (Affidavit of Curtis Snyder, ¶22.)

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[11] The fact that Marcus Cable's agreement is characterized as a "permit agreement" rather than a "license agreement" does not reflect any substantive difference. Rather, since Marcus Cable already has a "license" under the Cable Franchise Ordinance, its agreement with the City is for a permit. (Affidavit of Curtis Snyder, ¶20.)

[12] A comparison of the permit agreement proposed to Marcus Cable and the License Agreement proposed to Chibardun shows that the agreements are substantively identical. The fact that Chibardun had a franchise agreement with the City, however, necessitated certain modification. For instance, since Marcus Cable already has a license, the company is referred to in its agreement as a "Permitee" rather than a "Grantee." In addition, since Marcus Cable's proposed construction is for cable television system upgrades, rather than a telecommunication system, the Marcus Cable agreement does not need to reference "telecommunications." (See, e.g., Marcus Cable Agreement of Conditions to Excavation Permits, Recitals, Definitions.) The substantive provisions that Chibardun challenges in its Petition (see Petition, pp. 21-23) are contained in the Marcus Cable permit agreement in the same way as they are contained in its License Agreement proposed to Chibardun. This is described more fully below at Section III(C)(2) of these Comments.

ARGUMENT

I. THE PREEMPTION PETITION SHOULD BE DENIED ON PROCEDURAL GROUNDS BECAUSE THE ISSUES IT RAISES ARE NOT THE PROPER SUBJECT OF COMMISSION REVIEW.

Chibardun's Petition should be dismissed at the outset for the simple reason that it raises issues that are not a proper subject for Commission review. As set forth below, the Petition raises issues that are completely outside of the Commission's Section 253(d) preemption authority and seeks an advisory opinion on issues that are not ripe for review and where there has been no injury to redress.

A. The Commission Lacks Jurisdiction to Render the Preemptive Relief Chibardun Seeks Under Section 253(d).

Chibardun's Petition should be dismissed because the Commission does not have jurisdictional authority to issue the preemptive relief Chibardun seeks under Section 253(d). From the face of the Petition itself, it is clear that Chibardun's sole dispute with the City's actions arises out of public rights-of-way management and compensation matters, all of which are excluded by Section 253 from Commission review. By its Petition, Chibardun seeks to preempt the City "from imposing anticompetitive and discriminatory right-of-way requirements and fees upon Chibardun and other entities . . . ." (Petition, p. 1 (emphasis added).) Breaking this down into specific claims, Chibardun focuses on an *alleged* refusal of the City to grant an excavation permit, the terms of the "License Agreement for Use of City Rights-of-Way," the enforcement of procedures under the Interim Ordinance for excavation permits and the City's adoption of a future ROW Ordinance. (See Petition, pp.

1-2). All of these issues concern the City's right to manage and be compensated for use of public rights-of-way, a category of regulatory matters that Congress specifically excluded from the Commission's Section 253(d) preemption authority.

That the Commission's preemption authority under Section 253(d) does not extend to local rights-of-way management and compensation issues is made clear by the plain language of the Act. Section 253 expressly delineates the scope of the Commission's authority. It states:

> §253. Removal of barriers to entry
>
> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [47 USCS §254], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or

> legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(47 U.S.C. §§253(a)-253(d) (emphasis added).)

The structure and terms of these specific provisions dictate the scope of the Commission's Section 253 preemption authority. Section 253(a) sets forth the first limit on the ability of state and local governments to regulate, and by its terms the limit is narrow -- only regulations that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service are precluded. Sections 253(b) and 253(c) then carve out defined areas in which states or local governments can regulate. The Commission recently confirmed this in In the Matter of the Public Utility Commission of Texas, FCC 97-346 (released October 1, 1997) (hereafter "Texas PUC"). In Texas PUC, the Commission specifically addressed the relationship between subsections (a) and (b) and made clear that subsection (b) limits all of Section 253, including the restrictions imposed in subsection (a).[13] (Id. at ¶42-44.) The same qualifying language the Commission relied on to reach that conclusion ("Nothing in this section") prefaces subsection (c) as well as subsection (b). Accordingly, subsection (c) must also be viewed as a "safe harbor" that overrides subsection

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[13] The Commission specifically stated that "irrespective of subsection (a), states retain authority to impose on carriers the types of requirements specified in subsection (b) provided that such measures satisfy the criteria set forth in that subsection. . . . Subsection (a) is the only portion of section 253 that broadly limits the ability of states to regulate. All of the remaining subsections, including subsection (b), carve out defined areas in which states may regulate or continue to regulate, subject to certain conditions." (Texas PUC, ¶¶43-43 (emphasis added).)

(a) and leaves room for state and local regulation. Like subsection (b), subsection (c) carves out a defined area where local governments may regulate.

Although Section 253 creates two safe harbors, one for a state's right to impose requirements necessary to preserve and advance universal service, protect public safety and welfare, ensure continued quality of telecommunications services and safeguard the rights of consumers and a second which allows state or local governments to manage the public rights-of-way and obtain compensation for their use, the Commission only has power to preempt state and local requirements that violate subsections (a) or (b). This is clear on the face of the Act itself. Section 253(d) specifically authorizes the Commission to preempt state and local requirements that violate subsection (a) or subsection (b), but it excludes subsection (c) from its grant of preemption authority. The language of the Act confirms that the Commission does not have authority under subsection (d) to preempt state or local requirements that relate to the management of or compensation for use of the public rights-of-way.

This is confirmed further by the Congressional history underlying the Act. Subsection 253(d) was added to the Act in conference, based on Section 254 of the Senate Bill.[14] As originally proposed in the Senate, Section 254 authorized the Commission to preempt local government activities that were within subsection (c), as well as those within Sections 253(a)

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[14] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 126-27 (1996). Section 254 ultimately became Section 253 in the Act. The House version did not contain a provision for preemption. (Id.)

and (b). Local government concern with the broad preemption authority contained in Section 253(d) generated a proposed amendment to remove the subsection (d) preemption provision entirely and thereby leave all barrier to entry disputes falling under Sections 253(a), (b) and (c) to the courts. A compromise amendment offered by Senator Gorton was finally adopted to afford the Commission specifically delineated preemption authority while preserving state and local authority over the management of and compensation for public rights-of-way. The Gorton Amendment revised subsection (d) to clarify that subsection (c) disputes, unlike those under subsection (a) and (b), would not be subject to Commission preemption. The intention of the amendment, as reflected in the current subsection (d), was to remove Commission preemptive authority from the regulation of disputes over state and local rights-of-way management and compensation requirements. As Senator Gorton stated:

> There is no preemption . . . for subsection (c) which is entitled, "Local Government Authority," and which preserves to local governments control over their public rights-of-way. It accepts the proposition . . . that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.[15]

This history confirms what is clear from the face of Section 253 itself -- the Commission's subsection (d) preemptive power comes into play only where a preemption petition does not concern matters falling within subsection (c). As Commissioner Susan

[15] 141 Cong. Rec. S 8213 (Daily Ed. June 13, 1995) (remarks of Sen. Gorton) (emphasis added).

Ness has made clear, "Congress carefully crafted the preemption language in Section 253 of the [Act] . . . and entrusted the Commission to navigate between two critical but competing objectives: (1) fostering competition, by enabling 'any entity to provide any interstate or intrastate telecommunications service' (Sec. 253(a)); and (2) allowing the legitimate exercise of state and local authority (Sec. 253(b) and (c))." (California Payphone (Separate Statement of Commissioner Susan Ness).) Because it is clear in this case that Chibardun's Petition challenges local rights-of-way management and compensation matters, the issues at stake fall squarely within Section 253(c). As a result, the Commission has no preemptive power to assess or determine the validity of Rice Lake's local requirements. Chibardun's Petition should be dismissed accordingly.

B. Chibardun Lacks Standing to Challenge the Validity of the Rice Lake Licensing Agreement, Interim Ordinance, and Future ROW Ordinance.

It is well established that in order to have standing to challenge an action, a petitioner must have a legally protected interest that is concrete and particularized and that has been injured by the challenged action. There must also be a causal connection between the injury and the conduct complained of, and it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. (Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Also established is the policy against decisionmakers considering issues in the abstract and rendering advisory opinions in the absence of a concrete set of facts presented for review. See, e.g., Federal Communications Commission v. Pacifica Found., 438 U.S. 726, 734-34 (1978).

Although standing and the doctrine against advisory opinions are matters that apply directly to federal courts, the purposes of the doctrines of precluding review where there are no concrete facts underlying a claim and where there is no injury to redress by resolving the alleged "dispute" apply to Commission actions as well. In fact, the Commission recently applied these principles when it refused to resolve a petitioner's Section 253 claims where there was no concrete dispute between the parties to be resolved. (See City of Troy, ¶7 (where petitioner had no present intention of offering telecommunications services with the city such that resolution of petitioner's claims would have no impact on its interests, "there is no concrete dispute between [the parties] and the Commission therefore declines to issue a declaratory or advisory ruling).) These principles are particularly applicable here where Chibardun can show no injury resulting from any alleged City action.

Chibardun first asks the Commission to preempt the draft Licensing Agreement that the City presented to Chibardun for consideration. Chibardun's argument completely ignores the fact that the License Agreement was just a starting point for further negotiation. It was not a final document, it was never signed by either party, had no legal enforceability, and was at no time "imposed" on Chibardun. To the contrary, it was offered in draft form as a proposed agreement the parties were to discuss. Thus, the License Agreement, an unfinished document, could in no way have prohibited or even materially inhibited Chibardun's entry into the Rice Lake telecommunications market. Since there is no way to even know what the final terms of the License Agreement would have looked like had Chibardun entered into discussions with the City, the Commission has no established facts on which to make a

determination under Section 253(a). This is precisely the type of abstract and amorphous matter in which the Commission should not entangle itself.

The standing issue and the policy against advisory opinions are even more acute with respect to Chibardun's challenges to the Interim Ordinance and the City's future ROW Ordinance. Not only are there no concrete facts for the Commission to consider, but Chibardun cannot show any injury traceable to City actions because it withdrew its permit applications before the Interim Ordinance was adopted. Chibardun applied for permits to construct in and use City rights-of-way on May 20, 1997. By its June 9, 1997 letter, Chibardun voluntarily rescinded its construction plans and withdrew its permit applications. The City's Interim Ordinance was not enacted until August 26, 1997, more than two months after the permit applications were withdrawn. The Interim Ordinance certainly could not have been the impetus of Chibardun's decision to withdraw the applications. Moreover, since Chibardun had no interest pending at the time the Interim Ordinance was adopted, the company cannot establish that the Interim Ordinance caused or was in any way connected to any injury it alleges. Under these facts, the Interim Ordinance could not have prohibited or even materially inhibited Chibardun's ability to provide telecommunications service within the City.

Similarly, Chibardun cannot claim any injury attributable to a future ROW Ordinance the City may pass. The City has not yet enacted a ROW Ordinance. Chibardun cannot legitimately argue that a non-existent ROW Ordinance or any provisions of such an ordinance apply in a way that precludes or materially inhibits Chibardun's or anyone else's

entry into the Rice Lake telecommunications market. Thus, there is no way to tie such ordinance to any decision or action by Chibardun. Furthermore, without even knowing what terms a future ROW Ordinance will contain, any determination by the Commission on the effect of the ROW Ordinance would be speculative and outside the realm of proper action.

Simply put, Chibardun cannot validly claim that it has been prohibited or materially inhibited from providing "interstate or intrastate telecommunications service" in Rice Lake by the draft License Agreement or by either ordinance. The only thing that has prevented Chibardun from providing services in the City is its own unilateral and voluntary decision to withdraw its permit applications, less than three weeks after filing them, and proceed with litigation rather than good faith discussion. It is not the License Agreement or the ordinances that could have prevented Chibardun from providing telecommunications services. Until such time as Chibardun can demonstrate that (1) it has sustained some injury as a result of a City action; and (2) that such injury is likely to be cured by a favorable Commission decision, the principles underlying Lujan, Pacific Found., and City of Troy warrant dismissal of Chibardun's Petition.

II. CHIBARDUN DOES NOT SHOW THAT ANY ACTION TAKEN BY THE CITY "PROHIBIT[S]" OR HAS THE "EFFECT OF PROHIBITING" CHIBARDUN'S ABILITY TO PROVIDE TELECOMMUNICATIONS SERVICES IN RICE LAKE.

A. Chibardun Must Show That the City's Actions Violated Section 253(a).

In the event the Commission proceeds with considering the merits of Chibardun's Petition, which the City believes it should not, the Petition should be denied because

Chibardun fails to establish that it is entitled to relief. As the party seeking preemption, Chibardun bears the burden of proving to the Commission that the City's actions prohibited or had the effect of prohibiting Chibardun's ability to provide telecommunications service within the meaning of 253(a), and that the City's actions did not fall within either Section 253(b) or Section 253(c). The Commission explained and confirmed this burden in City of Troy, when it stated:

> [I]t is up to those seeking preemption to demonstrate . . . that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers' ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).

(City of Troy, ¶101 (emphasis added); see also California Payphone (Separate Statement by Commissioner Susan Ness) ("Those who seek preemptive action by this Commission should be prepared to demonstrate, with particularity, precisely how the municipal or state action forecloses them or others from competing and what remedy will effectively solve the problem").)

In order to meet the Section 253(a) burden, Chibardun must provide the Commission with "credible and probative evidence"[16] establishing either that the challenged action

[16] As the Commission instructed in City of Troy, a party's initial pleading should contain a complete and accurate account of the facts and should be supported by credible evidence, including affidavits. (City of Troy, ¶77 and note 198.)

absolutely precludes it from providing telecommunications service or that the action "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." (City of Troy, ¶¶98, 101.) Chibardun meets neither of these standards.[17]

As shown below, this case is in marked contrast to cases in which the Commission has exercised Section 253(d) preemption authority. For instance, in In the Matter of Silver Star Telephone Company, Inc., FCC 97-336 (released September 24, 1997) the Commission preempted a Wyoming Public Service Commission order, and an underlying state statute, which denied Silver Star a concurrent Certificate of Public Convenience and Necessity. The Commission did so after it determined that the order and underlying statute "clearly prohibit[ed] Silver Star from providing telecommunications service" in the relevant exchange. (Id. at ¶38 (emphasis added).) Similarly, in In the Matter of Classic Telephone, Inc., 11 FCC Rcd. 13082 (1996) (hereafter "Classic Telephone I"), the Commission preempted certain municipalities' denial of a franchise to a prospective telecommunications service provider after it determined that the municipalities intended to choose only one provider and absolutely prohibit entry by other competitors. (Classic Telephone I, 11 FCC Rcd. at 13096-97.) (See also In the Matter of New England Public Communications Council, 11 FCC Rcd. 19713, 19721 (1996)) (Commission preempted a Connecticut Department of

[17] Furthermore, as shown in Section III below, Chibardun cannot meet the second prong of the evidentiary burden enunciated in City of Troy and show that any challenged action of the City did not "meet[ ] the requirements of section 253(b) and/or (c)." (City of Troy, ¶101.)

Public Utility Control decision which "[o]n its face" prohibited an entire class of telecommunications service providers from providing such service) (emphasis added).) In the present case, there is no clear, absolute or "on its face" prohibition. Nor is there any action by the City that materially inhibits entry into the Rice Lake market.

B. The City's Decision Not to Issue Excavation Permits Immediately Was Reasonable and Did Not Prohibit or Materially Inhibit Chibardun's Entry.

Chibardun makes much of the fact that the City did not "rubber stamp" the company's May 20, 1997 permit applications and immediately grant the excavation permits. (Petition, pp. 14-15.) Citing In the Matter of Classic Telephone, Inc., FCC 97-335, ¶28 (released September 24, 1997), Chibardun tries to characterize the City's processing of its excavation permit applications as action that prohibited the company from providing telecommunications services in Rice Lake in violation of Section 253(a). (Petition, p. 18.) Chibardun is wrong. The City's review and processing of the permit applications neither flatly prohibited nor materially inhibited Chibardun's ability to enter the Rice Lake telecommunications market.

1. Chibardun was not entitled to "rubber-stamped" permits.

It is patently absurd for Chibardun to contend that it was entitled to rubber-stamped permits granted with little or no City review. The Rice Lake City Code expressly requires parties to obtain permits before initiating excavation activity in public rights-of-ways. (Rice Lake City Code, Section 6-2-3, Exhibit A to Petition.) This requirement exists for a reason, as it provides the City with a means of ensuring that excavation and construction are done

safely and in a manner that minimizes rights-of-way disruption. Chibardun's apparent belief that it had a right to receive permits without City review would nullify the permit requirement and the reason the requirement exists.

Chibardun's suggestion that it was entitled to rubber-stamped permits because GTE received a permit in November 1996, five days after submitting a permit application, is equally absurd. (See Petition, p. 8 and Exhibit B to the Petition.) The GTE application was submitted under much different circumstances and covered different activities than the applications Chibardun submitted. First, the GTE application shows on its face that it was filed in November of 1996. This was months before Chibardun, or any other entity, approached the City as a competing telecommunications provider, and before the questions about how to manage public rights-of-way when there are multiple, concurrent and competing users were ever presented to the City. These issues simply were not before the City at the time of GTE's application. Furthermore, the GTE application reflects that the approval GTE was seeking was markedly different than the approvals Chibardun sought. GTE requested approval to bury a cable within a 140-foot area. In contrast, Chibardun sought approval for excavation and construction activities that were to enable it to build an entirely new telecommunications and cable television system in the City. Chibardun's activities were significantly more extensive than GTE's planned activities and would have involved more than six miles of rights-of-way. (See Affidavit of Mick Givens, ¶21.) Thus, not only did the context in which the GTE and Chibardun applications were filed differ, but the type and extent of the proposed activities differed as well. Chibardun cannot point to

GTE's application to support its claim that the extensive excavation and construction activities it planned should have been "rubber-stamped" by the City without review.[18]

2. The City timely reviewed and responded to Chibardun's permit applications.

The amount of time the City took to review and consider Chibardun's permit applications was reasonable and did not violate Section 253(a). Chibardun submitted its excavation permit applications for an entirely new telecommunications network on May 20, 1997.[19] The City responded within three days, confirming for Chibardun that the applications were being reviewed, informing the company of the City's plans to allow a license agreement so as to prevent delay while a rights-of-way ordinance was being developed and requesting information about the company's plans. (See May 23, 1997 letter from Curtis Snyder to Chibardun, attached as Exhibit C to the Petition.) Although Chibardun never provided the requested information, the City proceeded to develop the proposed License Agreement and sent it to Chibardun two weeks later.

On June 6, less than three weeks after Chibardun filed its permit applications, the City sent Chibardun the proposed License Agreement, which would have constituted a grant of

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[18] Even if such an argument had merit, the facts show that Chibardun was not willing to wait even five days for the City to review its applications. On May 21, 1997, only one day after submitting the applications, Chibardun asked to be placed on the Common Council's agenda to address "the denial of Chibardun's street right-of-way permits." (See Chibardun's May 21, 1997 letter, attached as Exhibit 9 to the Snyder Affidavit.) Chibardun apparently believed it was entitled to permits the same day it filed its applications.

[19] One must remember that Chibardun sought to begin construction activities by June 1, 1997, less than two weeks from the date it submitted its permit applications.

authority for Chibardun to begin construction. Three days later, on June 9, Chibardun announced that it would "cancel it's [sic] plans to provide Cable TV and Telephone service to the citizens of Rice Lake" . . . and "file a 'Preemption Petition' with the Federal Communications Commission." (See Chibardun's June 9, 1997 letter, attached as Exhibit 3 to the Snyder Affidavit.) Thus, Chibardun allowed only 20 days to lapse between submitting its permit applications and deciding to file a preemption petition, and did so even though the City responded in the interim and offered the License Agreement as a vehicle for approving the applications. The Commission has previously determined that a municipality would be acting "expeditiously" by reconsidering a franchise application in 60 days. (See Classic Telephone I, 11 FCC Rcd. 13108.) The City reviewed and responded to Chibardun's permit applications in much less time. Based on the timing alone, Chibardun cannot show that the City's review of the permit applications was unreasonably delayed so as to violate Section 253(a).

Furthermore, the City could not simply grant the permits without first addressing several important issues presented by Chibardun's permit applications. First, the City's existing regulations did not address increased use of the rights-of-way by additional, and potentially multiple new providers. Nor did the existing regulations provide for rights-of-way management practices necessary to meet such increased use. The City needed to determine how it should proceed under such circumstances. This very same situation was recently addressed in a judicial action, when a federal district court addressed a claim under

Section 704 of the Act.[20] In Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036 (W.D. Wa. 1996), The plaintiff claimed that the City of Medina had violated Section 704 when it adopted a six-month moratorium on the issuance of special use permits for wireless communications facilities. (Id. at 1037.) The plaintiff claimed that the moratorium prohibited such facilities and therefore violated the Act by prohibiting such facilities. (Id.) The court disagreed. Noting that the City of Medina had adopted the moratorium so that it would have time to deal with the impacts of Congress opening the telecommunications industry to competition, the court held that the "short-term suspension" (i.e., six-month period) on permit issuances while Medina gathered information and processed applications was not a prohibition and did not have a prohibitory effect. (Id. at 1040.)

The same is true in this case except that much less time is involved. As the Commission is no doubt aware, increased demand by telecommunications providers to construct facilities in local rights-of-way has caused municipalities across the country to evaluate their existing regulations to determine whether they adequately protect the municipalities' rights-of-way management and compensation interests. Few, if any, Wisconsin municipalities have completed that process. Some, like the City of Rice Lake, had not begun the process at the time the first request from a new entrant to provide

[20] 47 U.S.C. §332(c). Section 704 is analogous to Section 253, except that it pertains to wireless telecommunications services. Like Section 253, Section 704 preserves certain local government management authority but prevents such governments from unreasonably discriminating among providers and from prohibiting the provision of wireless services. (47 U.S.C. §332(c).)

telecommunications services came in. A municipality in this situation has essentially two options -- it can either attempt to hold such requests in abeyance until new regulations are developed and adopted, or use an interim agreement that allows the municipality to protect its public rights-of-way management and compensation interests, while at the same time ensuring that entry is not prohibited or unreasonably delayed.

In an effort to accommodate Chibardun's expedited construction schedule, Rice Lake chose the latter course. Since it did not have the time or the ability to develop and adopt a comprehensive rights-of-way ordinance within the short time frame Chibardun required, the City offered Chibardun the opportunity to negotiate a license agreement that would allow the company to go forward and begin construction, yet protect the City's rights-of-way interests on an interim basis. As shown above, the City provided Chibardun with the draft License Agreement on June 6, 1997, only 18 days after the permit applications were filed. Given the nature of Chibardun's plans to construct a whole new telecommunications and cable television network in more than six miles of City rights-of-way, the City acted promptly in its review. (Compare Sprint Spectrum, 924 F. Supp. at 1040 (six-month moratorium did not prohibit or have the effect of prohibiting wireless services).)

This is particularly true when one considers the nature of Chibardun's relationship with the City on the cable franchise matters and the fact that the City had very little information about Chibardun's plans on which to proceed. Despite Chibardun's demands for accessing public rights-of-way to construct what was to be a City-wide telecommunications and cable television network, the City knew practically nothing about

the company -- including such things as what services would be provided and whether Chibardun had obtained the requisite certification from the Public Service Commission of Wisconsin ("PSC") so that it could provide telecommunication services within Rice Lake and within the state. As a result, the City was faced with the prospect of granting permits to an entity that was demanding expedited action but that refused to supply information about its plans and abilities to actually utilize the rights-of-way and warrant their disruption.

Adding to the City's lack of information as to what Chibardun's plans were and whether the company would actually be capable of making use of the rights-of-way space it was seeking to excavate, actions on Chibardun's own part raised significant concerns about the company's intent to comply with applicable regulations. For instance, the City had very real concerns that Chibardun intended to construct a cable television system without first obtaining a franchise as required by 47 U.S.C. §541 and Section 66.068 of the Wisconsin Statutes.[21] Chibardun not only had no cable television franchise at the time it applied for the excavation permits, but the company's General Manager openly stated his belief to the Cable Commission that Chibardun could construct such a system without a franchise. The fact that Chibardun had no cable franchise at the time it applied for the excavation permits, together with Chibardun's contention that it could proceed with construction without a franchise raised significant question with the scope and manner of Chibardun's planned excavation and

[21] It is the City's position that it cannot allow a prospective cable operator to use local rights-of-way to construct a cable television system without first obtaining a cable television franchise.

construction activities and with Chibardun's willingness to comply with regulatory requirements.[22] Under these circumstances, it was entirely reasonable for the City to evaluate Chibardun's permit applications rather than rubber stamp them without review. Contrary to Chibardun's suggestions, the City acted expeditiously in reviewing the applications and providing Chibardun with a means, through the proposed License Agreement, of obtaining the permits it needed to begin construction. There was no unreasonable delay that could constitute either an absolute prohibition or a material inhibition on entry.

Furthermore, Chibardun's suggestion that its permit applications are pending to this day without decision is wrong. (See Petition, p. 18.) In its June 9, 1997 letter (Exhibit 3 to the Snyder Affidavit), Chibardun clearly stated that it had cancelled its plans to begin construction in 1997. Based on this letter, the City understood that Chibardun's permit applications had been withdrawn. (See Affidavit of Curtis Snyder, ¶18; Affidavit of Mick Givens, ¶22.) Indeed, since a permit is only valid if the work begins within 30 days of the permit being issued, there would have been no point for the City to issue the permits after Chibardun cancelled its plans. (See Section 6-2-4(f) of the Rice Lake Code, Exhibit A to Petition.)

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[22] While Chibardun was adamant in its demands that the City immediately amend its cable television franchise ordinance and grant it a cable television franchise, the company balked at the City's request that it submit information on which the City could evaluate the franchise request and determine whether Chibardun had the financial, technical, or legal qualifications to provide cable service or whether it would provide adequate public, educational, and governmental access channel capacity and facilities. (See 47 U.S.C. §541(a)(4).)

The fact that Chibardun did not begin constructing its telecommunications and cable television systems in June 1997 is attributable only to Chibardun's actions, not to any alleged "delay" by the City. Given the nature of its demands, Chibardun should have initiated discussions with the City and submitted its permit applications much earlier than it did. Chibardun first met with the Rice Lake Cable Commission less than seven weeks before it planned to begin construction. Even at this late date, Chibardun's discussions with the Commission focused principally on the cable franchise issues. Since Chibardun did not apply for the excavation permits until May 20, 1997, any "delay" in its June 1, 1997 construction date is attributable only to its own planning, or lack of planning. While the City moved quickly in an attempt to accommodate Chibardun's construction plans, the fact that the City could not jump through the hoops that Chibardun held up as quickly, and when and how often it wished, does not support Chibardun's claim that the City's actions violated Section 253(a).

C. While Chibardun Asks the Commission to Exercise Its Preemption Authority Regarding the License Agreement, the Interim Ordinance and a Future ROW Ordinance, Chibardun Never Claims, Much Less Demonstrates, That These Measures Violated Section 253(a).

1. Chibardun makes no claim that the License Agreement, Interim Ordinance or future ROW Ordinance prohibits or has the effect of prohibiting entry.

A careful reading of Chibardun's Petition reveals that Chibardun never directly claims, much less demonstrates, that either the License Agreement, the Interim Ordinance, or the future ROW Ordinance prohibits or has the effect of prohibiting Chibardun from

providing telecommunications service in violation of Section 253(a). Instead, what Chibardun argues is that the City's failure to immediately grant the excavation permits was a prohibition on entry and that the License Agreement and the Interim Ordinance did not remove or excuse the prohibition. (Petition, pp. 15-17.) Regarding the yet-to-be-drafted ROW Ordinance, Chibardun merely suggests that the non-existent ordinance may continue to prevent Chibardun's entry into the Rice Lake market. (Petition, p. 18.) In the absence of a claim that the License Agreement, the Interim Ordinance, or the future ROW Ordinance prohibits or has the effect of prohibiting entry, the Commission cannot exercise whatever preemptive authority it might have over these measures.

2. Even if Chibardun's complaints are construed as tantamount to a claim that either the License Agreement, the Interim Ordinance or a future ROW Ordinance prohibits or effectively prohibits entry, such claim is groundless.

Even if the Commission interprets Chibardun's Petition as implicitly containing a claim that either the License Agreement, the Interim Ordinance or a future ROW Ordinance prohibits or has the effect of prohibiting competitive entry into the City's telecommunications market, the claim fails. As shown below, neither the proposed License Agreement, the Interim Ordinance or a future ROW Ordinance prohibits or materially inhibits such entry.

a. The proposed License Agreement does not prohibit or materially inhibit entry.

There is nothing on the face of the proposed License Agreement that prohibits or materially inhibits entry. (See Draft License Agreement, Exhibit E to the Petition.) To the contrary, the Agreement contains an express grant of authority for Chibardun to "construct, maintain, and operate its Telecommunications Network . . . in, upon, along, above, over and under City Rights-of-Way." (Draft License Agreement, p. 3, Section 4(a).) Since the License Agreement authorizes, rather than prevents use of City rights-of-way, it cannot be considered a prohibition on entry under Section 253(a). Thus, the only way Chibardun could demonstrate a violation of Section 253(a) is if it shows that the proposed License Agreement "materially inhibits or limits" Chibardun's ability to enter into and compete in the Rice Lake market. (See City of Troy, ¶98.) Chibardun cannot do so.

Chibardun challenges six provisions of the draft License Agreement as being onerous. (Petition, pp. 15-17.) As Chibardun apparently concedes, each of the challenged provisions is related to the City's right-of-way management and compensation interests. Either alone, or taken together, none of these provisions can be said to materially inhibit Chibardun's entry. Each challenged provision is addressed below:

Section 15 -- The Effect of a Future ROW Ordinance. Chibardun challenges Section 15 of the draft License Agreement, which states that the City intends to develop and adopt "a comprehensive ordinance regulating the use of City's Rights-of-Way" and provides that "Grantee agrees to comply with all provisions of the Telecommunications Ordinance,